Danny's Foods, Inc. *and* **Lynn Gruska** *and* **Local 339, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.** Cases 7-CA-17417, 7-CA-18462, and 7-CA-17836

March 31, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 30, 1981, Administrative Law Judge Robert T. Wallace issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondent, Danny's Foods, Inc., Southfield, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Relieving employees of work assignments or otherwise discriminating against them in regard to their hire, tenure of employment, or any other term or condition of employment because they filed grievances under the collective-bargaining agreement.

(b) Attempting to induce employees to file complaints against an employee who has filed a grievance in order to generate a basis for taking adverse action against that employee.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Restore Lynn Gruska to her former assignment as alternate receiver or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights previously enjoyed and make her whole for any loss suffered by reason of the discrimination against her, with interest, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). (See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).)

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records and reports, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business on 8 Mile Road in Southfield, Michigan, copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by its representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] No exceptions have been filed to the Administrative Law Judge's dismissal of the alleged 8(a)(5) violation based on Respondent's failure to comply fully with the arbitration award or to his determination with respect to the alleged 8(a)(1) and (3) violation that post-arbitral deferral under *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), is inappropriate.

Chairman Van de Water and Member Hunter agree with the Administrative Law Judge's conclusion that Respondent violated Sec. 8(a)(1) and (3) of the Act by removing employee Gruska from her position as alternate receiver. In so doing, they note that Respondent's conduct was in retaliation for Gruska's having filed a grievance under the parties' collective-bargaining agreement. See *Walker Electric Co., Inc.*, 219 NLRB 481, 486 (1975), and *Mushroom Transportation Co., Inc.*, 142 NLRB 1150, 1156 (1963).

The Administrative Law Judge found implicit in Respondent's arguments the contention that employee Gruska, as an alternate receiver, was a managerial employee. He rejected such "contention" on the basis that Respondent previously had agreed to include the position in the bargaining unit. We find it unnecessary to pass on the Administrative Law Judge's comments since Respondent in its exceptions has raised no issue of Gruska's employee status and the record contains no evidence that employee Gruska was a managerial employee.

[3] We shall modify the recommended Order to include provisions which more specifically remedy the violations found and a general cease-and-desist provision.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT relieve employees of work assignments, or otherwise discriminate against them in regard to their hire, tenure of employment, or any term or condition or employment because they file grievances under the collective-bargaining agreement.

WE WILL NOT attempt to induce employees to file complaints against an employee who has filed a grievance in order to generate a basis for taking adverse actions against that employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL restore Lynn Gruska to her former assignment as alternate receiver or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights previously enjoyed and WE WILL make her whole for any loss suffered by reason of the discrimination against her, with interest.

DANNY'S FOODS, INC.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge: Upon charges filed by the Union (Local 339, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) and Lynn Gruska, an individual, against Respondent (Danny's Foods, Inc.), a consolidated complaint was issued on November 21, 1980, in which it is alleged that Respondent violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by, among other things, denying Lynn Gruska an opportunity to work as a substitute receiver. The case was heard before me at Detroit, Michigan, on February 23 and 25, 1981.

Upon the entire record, and after due consideration of the oral argument of the General Counsel and the brief filed by Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a retail grocer with stores at several locations (including one in Southfield, Michigan) in or near Detroit, Michigan. Its principal office is in Inkster, Michigan. During the year ending December 31, 1979, which period is representative of its operations during all times material hereto, it had gross revenues in excess of $500,000 and it purchased and caused to be transported and delivered to its stores in Michigan food products and other goods and materials in excess of $50,000, which goods and materials moved directly from points located outside in the State of Michigan. It admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Lynn Gruska has been in Respondent's employ as a full-time cashier for about 6 years. In July 1979, she was transferred to Respondent's newly opened grocery store in Southfield and given an additional responsibility as alternate or substitute receiver at that store. In the latter capacity she was to fill in as receiver whenever the regular receiver was on leave or otherwise unavailable. Under the terms of a collective-bargaining agreement between Respondent and the Union, which was in effect at all times pertinent herein, the position of receiver is included in the same classification as cashier but is rated at 20 cents per hour over the hourly rate for cashier. Responsibilities of the receiver include verifying that quantities of goods delivered are the same as those invoiced, signing checks (subject to countersigning by a company official) for all C.O.D. orders, and authorizing payment for all other deliveries. The position is particularly sensitive because the goods usually move directly to shelves for sale without recheck by management as to the quantities delivered. Seniority or other union considerations play no part in the selection of the receiver. Rather, a person is placed in that job solely at the discretion of management.

Employees at the Southfield store were given the option of choosing either a 5- or 6-day workweek, with the proviso that the option selected would be binding on all employees at the location; and by majority vote they chose a 5-day week. Subject to the 5-day policy, cashiers were entitled to work every other Sunday at time-and-one-half their regular rate of pay. By custom, however, the receiver did not participate, and instead worked regularly Monday through Friday.

On Friday, January 4, 1980, a work schedule was posted for the following week on which Lynn Gruska was assigned to work Monday through Friday as substitute receiver. But January 6 was her alternate Sunday to work as cashier, and, upon protest through the union steward, she was allowed to work that day. However, Wednesday was deleted from her schedule in accordance with the 5-day workweek policy. On the following Saturday (January 12), she made an oral grievance through

the union steward for a day's pay for Wednesday at receiver's wages. Not receiving satisfaction, she filed a written grievance on January 14 (the "Wednesday grievance") citing as a basis for her claim a provision in schedule A, article I, section 3(f) of the collective-bargaining agreement which reads as follows:

> The Employer shall each week in each store post a work schedule for such store for the following week. Full time employees shall be guaranteed work or pay for the number of hours so posted . . . .

Among other things, her written grievance stated: "On Friday, the following week's schedule was posted. My schedule read MON. thru Friday as receiver . . . plus Sunday."

On or about January 29, a local level hearing under the grievance procedure provided for in the collective-bargaining agreement was held at which Lynn Gruska was represented by the union business agent. According to the latter, the meeting ended with the store manager agreeing to satisfy the grievance upon proof (an "affidavit,") that the union steward who had informed Lynn Gruska on Saturday (January 4) that Sunday had been added to her work schedule for the following week, had not at the same time advised her that Wednesday had been deleted from the schedule. On February 5 the business agent provided a note to that effect from the steward, but the grievance was not remedied. The store manager denies that any settlement agreement was reached.[1]

On Saturday, February 2, Lynn Gruska noted that the regular receiver would again be absent during the following week, whereupon she asked the owner of the store (Dan Knopper) why she was not scheduled as substitute receiver. In reply, he stated that he had relieved her of that assignment because she had filed a grievance for an unearned day's pay, that by asserting the grievance she had shown that she was not 100 percent for the Company, and that he could no longer trust her in the sensitive job of receiving. With one "exception,"[2] Knopper admits that statement.[3] Her removal was made the subject of written grievance on February 5[4] and of formal charge (Case 7-CA-17417) on February 15.

The "Wednesday grievance" and the "removal grievance" were heard together by an arbitration board provided for in the collective-bargaining agreement and composed of employer and union representatives. Both Respondent and Lynn Gruska appeared and argued their respective positions before the panel. On April 21, the board resolved the grievances in her favor and found that she was entitled to the relief requested; i.e., a day's pay for Wednesday and reinstatement as alternate receiver. In connection with the removal grievance the board concluded "that the Company retaliated against the grievant for filing a grievance that the Company did not consider proper . . . as a tactic to punish the grievant for exercising her legal and contractual rights to file a grievance."

Respondent has complied with the decision of the arbitration board to the extent that it has paid Lynn Gruska all backpay to which she was entitled thereby, and it continues to pay her the 20-cent-per-hour premium for all hours in which a person other than the regular receiver fills in as receiver. However, it refuses to reinstate her as alternate receiver; and that refusal is the basis of a formal charge by the Union (Case 7-CA-17836) and an allegation in the complaint that Respondent thereby violated its duty under Section 8(a)(5) of the Act to bargain collectively with the representative of its employees.

Nancy Smith is a cashier at the Southfield store. Testifying under subpena, she states that one day in July 1980, Store Manager Teeple told her to shut down her register and follow him into the backroom. She did so fully expecting to be reprimanded for an earlier on-duty argument she had with another cashier (not Lynn Gruska). Instead he told her that "we have a problem in our store and the problem was Lynn"; that she was a "bad seed" who is ruining things for other cashiers; and that if the other cashiers felt she was a problem and wanted to "get rid of" her, his hands were tied unless they acted with "100 percent cooperation" in signing another written complaint. He then asked Smith to write up a complaint and have all the other employees sign it; and he said that the complaint should mention certain things like rudeness to customers; not carrying her workload, and not staying by the register. He also told her that if she did as requested things would work out fine but, if not, things "would get sticky in the store." Smith had not signed the earlier complaint (see fn. 4) since she did not agree with it; and made no attempt to comply with Teeple's asserted request that she initiate a new complaint and solicit signatures from other cashiers. During the next several months she feels she was treated very badly. Among other things, she claims she was not spoken to by management and she found it hard to function as a cashier in that environment.[5] Teeple does not recall details of the conversation, but he is sure that he never said that Smith should write up a complaint against Gruska. On other

[1] In the absence of impartial corroboration of the business agent's version, I find it impossible to resolve the conflict of testimony as to the existence of an agreement. Accordingly, the General Counsel has failed to meet his burden of proof on an element essential to establishing that Respondent's failure to settle the grievance gave rise to a breach of duty to bargain collectively under Sec. 8(a)(5) of the Act, as alleged in the complaint. That allegation will be dismissed.

[2] Knopper claims he did not say he relieved Gruska "because she filed a grievance." However, in an affidavit dated June 25, 1980, he admits that he did so at least in part because of the attitude which prompted her to file such a patently unwarranted grievance. Apart from any merit that distinction may have (and I find none) I credit Gruska's version of his reply.

[3] Knopper's reply is alleged in the complaint also to involve a threat in violation of Sec. 8(a)(1) of the Act. In addition, the same violation is alleged to have occurred in mid-May when two supervisors told Gruska that she was not being assigned as substitute receiver because she filed the "Wednesday grievance." I find no threats.

[4] Also on February 5, six cashiers signed and sent a letter to Knopper complaining of Gruska for being rude to other employees in front of customers, increasing the workload of other cashiers by taking excessively long breaks, and trying to change company rules to her own advantage regardless of how other employees would be affected.

[5] In addition, Smith indicates that she received a warning concerning absences and that another cashier told her that Teeple said he was going to "get rid of" Gruska. I find the former insufficient to warrant an inference that the warning was retaliatory and I decline to credit the latter absent direct testimony from the other cashier.

occasions, he told employees that they should put any complaints they have in writing, but he states that he has never directed an employee to file a complaint against another. He considers his post-conversation treatment of Smith to have been of the "highest quality," adding that "anything she asked of me I definitely gave her."[6] I credit Smith. Albeit given reluctantly under subpena, her testimony was candid and consistent; and she had nothing to gain by testifying adversely to the Company because she was still employed there. On the other hand, Teeple's testimony appeared to be studiously vague. He did not deny initiating the conversation, and his comments concerning his later conduct fall short of a disavowal of retaliatory employment of the "silent treatment."

Knopper states that Gruska had a history of causing dissention among cashiers; that he transferred her to the Southfield store and named her as alternate receiver there to give her a fresh start and as a token of his confidence in her potential; that he lost that confidence because of her "Wednesday grievance" and prior history; that his decision to remove her from that position was made on January 12, 2 days prior to the filing of her written grievance on January 14,[7] and that two subsequent events confirmed to him the correctness of his decision, to wit: the complaint by six of her fellow workers on February 5, and an incident on March 23, 1980, when she sold at 49 cents each two 10-pound boxes of detergent on sale for $4.49 per box. In connection with the latter incident, he expects that even if the price tags on the boxes were incorrect or the dollar digit key on the register had stuck (as sometimes happened), an experienced cashier should have caught the error.

Analysis and Conclusions

Initially, it must be decided whether Respondent's admitted failure to fully comply with the arbitration award by not reinstating Lynn Gruska abide by the collective-bargaining contract[8] in effect with the Charging Union, in violation of Section 8(a)(5) of the Act, as alleged in the complaint. In my opinion, that single instance of noncompliance with grievance procedures in the contract is insufficient to support a finding that Respondent has thereby repudiated its statutory duty to bargain collectively with the representative of its employees. In this respect the Board has long recognized that a breach of contract is not *ipso facto* an unfair labor practice. *Papercraft Corporation*, 212 NLRB 240, 241, fn. 3 (1974); and any event, the Board in a similar situation[9] has declined to make its processes available for enforcement of arbitral awards, finding that:

> . . . the desirable objective of encouraging the voluntary settlement of labor disputes through the arbitration process will best be served by requiring that parties to a dispute, after electing to resort to arbitration, proceed to the usual conclusion of the process-judicial enforcement . . . .

Accordingly, the allegation of violation of Section 8(a)(5) will be dismissed.[10]

Next, a decision must be made as to whether the award of the arbitration panel should be regarded as dispositive of the separate allegation in the complaint that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily relieving Lynn Gruska of her assignment as alternate receiver because she filed the "Wednesday grievance" protesting Respondent's scheduling of work. I see no reason for not determining the issue here. Although the panel concluded that her removal was in retaliation for filing the grievance, I find the post-arbitral deferral doctrine in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), inapplicable because there is lacking on this record sufficient information upon which to base a finding that the award meets the criteria set forth in that case.[11]

Turning to consider the substance of the discrimination issue, I am persuaded that the evidence establishes a *prima facie* violation of Section 8(a)(1) and (3). As noted above, I have credited the testimony of Gruska to the effect that Respondent's owner (Knopper) stated that he removed her because she filed the grievance; and it is well established that the filing of a grievance alleging a violation of a collective-bargaining agreement is a protected concerted activity regardless of whether the grievance relates solely to one employee's personal claim and regardless of the merits of the grievance. *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967); *ARO, Inc.*, 227 NLRB 243 (1976). Respondent accepts that statement of the law but points to the decision in the *Interboro* case as recognizing an exception in the case of a fabricated grievance. It argues that such is the case here because in her written grievance Gruska falsely stated that the schelule for the week involved called for her to work Monday through Friday, *plus Sunday*, when in fact that schedule as originally posted did not give her an assignment on Sunday.

[6] The conversation in question is alleged in a formal charge by Gruska (Case 7-CA-17836), and in the complaint, to involve independent violations of Sec. 8(a)(1).

[7] The implication here, later drawn in Respondent's brief, is that Knopper's removal action could not have been in retaliation for "the filing of" the grievance, as alleged in the complaint. But Knopper admittedly acted after learning of the oral grievance. The latter was lodged under the grievance procedure set forth in the collective-bargaining agreement and, accordingly, was a protected activity. Under those circumstances, the voicing of the grievance constituted its "filing"; and I so find.

[8] As pertinent, art. VII, sec. 2(b) of the collective-bargaining contract provides that ". . . all settlement made in the grievance procedure, including the decision of the Industrial [Arbitration] Board, shall be final and binding on all parties . . . ."

[9] *Malrite of Wisconsin, Inc.*, 198 NLRB 241 (1972), affd. in pertinent part 494 F.2d 1136 (D.C. Cir. 1974). See also *Advice Memoranda of NLRB General Counsel*, 101 LRRM 1168 (1979).

[10] In his oral argument, counsel for the General Counsel cites *B. N. Beard Company*, 231 NLRB 191 (1977), for the proposition that an employer may not reject a collective-bargaining agreement without violating Section 8(a)(5) of the Act. In that case the Board, in effect, denied a motion for summary judgment on the ground that a failure to honor an agreement to settle a grievance "might be viewed" as a failure to bargain under the Act, and it ordered that the complaint be assigned for hearing so that the issues raised could be considered on a complete record. I find that decision too tentative to have precedent value herein.

[11] For example, the representative of the grievant was a regular member of the arbitration panel and, absent affirmative evidence that he recused himself, the panel's award is not shown to be "fair and regular."

While the phraseology of the grievance lacks precision, I do not read the language used as necessarily stating that a Sunday assignment as cashier was listed on the schedule as *originally* posted. In any event, Knopper does not claim to have been deceived. Rather, as stated in his affidavit of June 25, 1980, he understood and strongly disagreed with "the substance" of the grievance. I find that Gruska was engaged in a protected concerted activity and that her removal as alternate receiver was in retaliation therefor.

In addition, based on testimony heretofore credited, I find that Respondent's store manager (Teeple) later attempted coercively to induce other employees (through Nancy Smith) to complain about Gruska, thereby to generate a basis for further adverse action against her because she filed the grievance. In so acting, Respondent further violated Section 8(a)(1) not only by infringing again upon Gruska's protected right to file the grievance but also, through its chilling effect, by interfering with, restraining, and coercing those other employees in the future exercise of rights guaranteed by Section 7 of the Act.

In light of the above, I am not persuaded by Respondent's defense on brief, based on *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), that it would have relieved Gruska as alternate receiver in the absence of the protected activity. In that respect it argues that under the collective-bargaining contract, management had absolute discretion in selecting or removing its receiver and alternate receiver, and that it would have used that discretion to relieve Gruska for complaining about the work schedule even if she had not invoked the grievance procedure. This is a variation of the argument considered and rejected in footnote 2, above. The basic error lies in the false assumption that Respondent's discretion is absolute when in fact such discretion, albeit broad, cannot be used, as here, to discipline an employee for exercising a protected right to file a grievance.

One final comment is appropriate. There appears to be implicit in Respondent's perspective throughout this proceeding a conviction that the position of receiver, because of its special responsibilities, is inherently managerial. That may be true. But Respondent is reminded that it agreed to inclusion of that position in the bargaining unit.

CONCLUSIONS OF LAW

1. By relieving Lynn Gruska of her assignment as alternate receiver because she filed a grievance, Respondent violated Section 8(a)(1) and (3) of the Act.

2. By attempting to induce other employees, through Nancy Smith, to complain about Lynn Gruska, thereby to provide a basis upon which Respondent could take adverse action against her because she filed the grievance, Respondent interfered with protected rights both of Lynn Gruska and those other employees, in violation of Section 8(a)(1) of the Act.

3. The aforesaid practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The evidence fails to establish any other unfair labor practices.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order it to cease and desist from engaging in those practices and to take certain affirmative action designed to effectuate the policies of the Act. Such affirmative action will include an offer to reinstate Lynn Gruska in the position of alternate receiver (or to a substantially equivalent position if that job is no longer extant) and making her whole for lost earnings and other benefits. Any backpay is to be computed on a quarterly basis from the date of removal to the date of proper offer of reinstatement, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as established in *Florida Steel Corporation*, 231 NLRB 651 (1977); see, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[Recommended Order omitted from publication.]